

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

Hon. Anita B. Brody

Kevin Turner and Shawn Wooden, *on
behalf of themselves and others similarly
situated,*

Plaintiffs,

Civ. Action No.: 14-cv-00029-AB

v.

National Football League and NFL
Properties, LLC, successor-in-interest to
NFL Properties, Inc.

Defendants.

THIS DOCUMENT RELATES TO:
Settlement Class Member Kendra Moyes
(SPID 950006982)

Hon. Anita B. Brody

**RESPONSE OF THE NATIONAL FOOTBALL LEAGUE AND
NFL PROPERTIES LLC IN OPPOSITION TO SETTLEMENT
CLASS MEMBER KENDRA MOYES' OBJECTION TO
THE SPECIAL MASTER'S DECEMBER 27, 2018 RULING**

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On December 27, 2018, following an appeal by Settlement Class Member Kendra Moyes, as Representative Claimant for Ken Stabler, and an opposition to that appeal by the National Football League and NFL Properties LLC (collectively, the “NFL Parties”), the Special Master determined that the claim submitted by Ms. Moyes failed to satisfy the Settlement Agreement’s requirements for a Qualifying Diagnosis of Alzheimer’s Disease (“Alzheimer’s”). Accordingly, the Special Master upheld the Claims Administrator’s denial of Ms. Moyes’ claim. On January 16, 2018, Ms. Moyes filed an Objection to the Special Master’s decision (“Claimant’s Objection”). The NFL Parties respectfully submit this response in opposition to Claimant’s Objection because, as shown below, the Special Master’s decision was correct and should be affirmed.

Preliminary Statement

Ms. Moyes initially submitted a Diagnosing Physician Certification Form for a Qualifying Diagnosis of Death with CTE, but later submitted a Claim Form for Alzheimer’s based on a post-mortem pathological evaluation of Mr. Stabler’s brain and statements from family members about his impairment. As Ms. Moyes has acknowledged, Mr. Stabler was not evaluated for, or diagnosed with, Alzheimer’s while alive. As such, Ms. Moyes cannot satisfy the fundamental requirement under the Settlement Agreement’s Injury Definition for a Qualifying Diagnosis of Alzheimer’s that a Retired NFL Football Player be diagnosed with Alzheimer’s *while living*, and not through a post-mortem examination.

In her Objection, Ms. Moyes attempts to seek relief from this fundamental requirement by invoking Sections 6.4 and 6.6 of the Settlement Agreement, as well as Settlement Program FAQ 116. But nothing in any of those provisions overrides or modifies the unambiguous foundational requirement that a Retired NFL Football Player must be diagnosed with Alzheimer’s while he is living. Instead, those provisions concern what is required when reviewing supporting materials for diagnoses made when the Retired NFL Football Player is living.

Ms. Moyes further contends, without evidence, that the Special Master did not consider her arguments on appeal concerning the Alzheimer’s diagnosis. That claim is baseless. The Special Master reviewed her appeal and the NFL Parties’ opposition—which exclusively concerned the Alzheimer’s diagnosis—and then denied the appeal.

For these reasons, and those set forth below, Claimant’s Objection should be denied.

Background

A. Factual Background

The Settlement Agreement sets forth the criteria necessary to establish a Qualifying Diagnosis. For players deceased prior to the Effective Date of the Settlement Agreement, such as Mr. Stabler, a Qualifying Diagnosis of Alzheimer’s requires “a diagnosis of Major Neurocognitive Disorder due to probable Alzheimer’s Disease . . . or a diagnosis of Alzheimer’s Disease, *made while the Retired NFL Football Player was living*” by a qualified physician. (Settlement Agreement, Ex. § 3(b) (emphasis added).) Here, however, Ms. Moyes acknowledges that Mr. Stabler never received a diagnosis of Alzheimer’s while living. Accordingly, a Qualifying Diagnosis for Alzheimer’s is precluded under the plain terms of the Settlement Agreement.

B. Procedural History

On September 25, 2018, Representative Claimant Kendra Moyes submitted a Claim Form on behalf of her deceased father, Ken Stabler, for a July 8, 2015 Qualifying Diagnosis of Alzheimer’s provided by neuropsychologist Dr. Todd Solomon and neuropathologist Dr. Ann C. McKee. (*See* Ex. 2, Claim Form at 3.)¹ Her Claim Package included records from Mr. Stabler’s

¹ Initially, Ms. Moyes submitted a Diagnosing Physician Certification Form signed by Dr. McKee for a diagnosis of Death with CTE on November 10, 2015. (*See* Ex. 3, Diagnosing Physician Certification Form at 6.) Ms. Moyes then wrote to the Claims Administrator to clarify that she was not seeking a Monetary Award for Death with CTE, but instead was seeking compensation for an Alzheimer’s diagnosis based on a post-mortem pathological examination of Mr. Stabler’s brain and statements by family members about his impairment when living. (*See* Ex. 4, Notice of Filing at 1, 6–7.)

cancer treatments; an affidavit from his oncologist, Dr. Allison Wall; an affidavit from his life partner, Kim Bush; and a post-mortem neuropathology report from Boston University, but did not contain any neurological evaluation or medical records that purported to diagnose Mr. Stabler with Alzheimer's prior to his death. Ms. Moyes acknowledged to the Claims Administrator that no such neurological examination occurred. (*See Ex. 4, Notice of Filing at 2, 6.*)

On September 28, 2018, the Claims Administrator denied Ms. Moyes' claim based on a determination that: (1) Mr. Stabler was ineligible to receive a Qualifying Diagnosis of Death with CTE because he died after April 22, 2015; and (2) Ms. Moyes did not submit a Diagnosing Physician Certification Form for any other Qualifying Diagnosis, such as Alzheimer's, that was made while Mr. Stabler was living. (*See Ex. 6, Denial Notice at 1.*) Ms. Moyes appealed that denial on October 25, 2018, solely as to the denial of the Alzheimer's diagnosis, and the NFL Parties filed an opposition on November 28, 2018. (*See Ex. 5, Appeal; Ex. 7, Opposition.*) On December 27, 2018, the Special Master issued a Post-Appeal Notice of Denial of Monetary Award Claim. (*See Ex. 8, Post-Appeal Denial Notice.*)

On January 16, 2019, Ms. Moyes filed an Objection to the Special Master's ruling, arguing that: (1) the Special Master "incorrectly applied the Settlement terms" by denying her appeal; and (2) "[t]he Special Master erred because it did not consider the Stabler Estate's Alzheimer's claim," as opposed to its Death with CTE claim, which involved different evidence. (*See Ex. 1, Claimant's Objection.*)

ARGUMENT

In her Objection, Claimant misunderstands or improperly seeks to modify the terms of the Settlement Agreement. The Settlement Agreement sets forth clear definitional requirements for a Qualifying Diagnosis of Alzheimer's. In accordance with those requirements, the Special Master

affirmed the denial of Ms. Moyes' claim because the Claim Package failed to meet the requisite criteria to establish the diagnosis.²

A. The Special Master Correctly Determined that the Terms of the Settlement Agreement Precluded a Qualifying Diagnosis of Alzheimer's

First, Claimant contends that “the Special Master erred as a matter of law by not applying the Settlement Agreement terms set forth in §§ 6.4 and 6.6 to [Ms. Moyes'] claim and relying on FAQ 89 to override the terms of the Agreement.” (Ex. 1, Claimant's Objection at 6.) This argument represents a fundamental misunderstanding of the Settlement Agreement and its Injury Definitions. The Special Master correctly applied the clear terms of the Settlement Agreement establishing that a diagnosis of Alzheimer's must be made while the Retired NFL Football Player is living—a fundamental requirement that this claim indisputably failed to meet.

The Settlement Agreement's Injury Definition for a Qualifying Diagnosis of Alzheimer's for players deceased prior to the Effective Date of the Settlement Agreement, such as Mr. Stabler, requires “a diagnosis of Major Neurocognitive Disorder due to probable Alzheimer's Disease . . . or a diagnosis of Alzheimer's Disease, *made while the Retired NFL Football Player was living*” by a qualified physician. (Settlement Agreement, Ex. 1 § 3(b) (emphasis added).) Settlement Program FAQ 89 confirms this requirement, stating that, for a Qualifying Diagnosis of Alzheimer's, “the Player had to have been diagnosed *while he was living* by a physician with the appropriate qualifications.” (Settlement Program FAQ 89 (emphasis added).) Here, Ms. Moyes acknowledges that Mr. Stabler was not diagnosed with Alzheimer's while living, and that fact presents an absolute bar to recovery under the Settlement Agreement.

² As noted above, the Claims Administrator also correctly determined that Mr. Stabler was not eligible for a Qualifying Diagnosis of Death with CTE based on his date of death. Ms. Moyes has not argued otherwise on appeal or in her opposition, and previously confirmed that she “does not seek a Monetary Award for a Qualifying Diagnosis of CTE.” (Ex. 5, Appeal at 1 n.1.) For this reason, the NFL Parties do not further address that basis for the claim denial.

Ms. Moyes argues, however, that Mr. Stabler should be excused from that requirement because Dr. McKee’s autopsy of Mr. Stabler’s brain found “Changes of Alzheimer’s disease,” and because Mr. Stabler’s life partner, Ms. Bush, described memory problems that Mr. Stabler developed in the last few years of his life. (*See* Ex. 1, Claimant’s Objection at 3–5, 6–9.) Ms. Moyes also argues that Mr. Stabler was too focused on fighting cancer to see a neurologist prior to his death (although she does not address the fact that he underwent extensive dental work in 2015 and was planning to have knee replacement surgery). (*Id.* at 3; Ex. 5, Appeal at 5.) In any event, there is nothing in the Settlement Agreement that provides an exception to the fundamental requirement of a diagnosis while the player is living. None of the provisions on which Ms. Moyes seeks to rely—namely, Sections 6.4(b) and 6.6(b) of the Settlement Agreement, and Settlement Program FAQ 116—provide for such relief.

Specifically, Section 6.4(b) of the Settlement Agreement states that “review of whether a Qualifying Diagnosis is based on principles generally consistent with the diagnostic criteria set forth in Exhibit 1 (Injury Definitions) does not require identical diagnostic criteria, including without limitation, the same testing protocols or documentation requirements.” (Settlement Agreement § 6.4(b).) That provision, however, concerns *how* a diagnosis is rendered while the player is living. It does not alter the fundamental requirement in the Settlement Agreement’s Injury Definition that a diagnosis of Alzheimer’s must be made *while* the player is living. Furthermore, the “generally consistent” criteria does not apply to Qualifying Diagnoses of Alzheimer’s disease. (Settlement Program FAQ 94 (“Diagnoses of Alzheimer’s Disease . . . are all made following the diagnostic criteria set out in [the Injury Definitions] (and the ‘generally consistent’ standard does not apply).”) For these reasons, the Claims Administrator properly did not apply Section 6.4(b) to this claim.

Next, Section 6.6(b) of the Settlement Agreement states that “Monetary Awards . . . shall compensate Settlement Class Members only in circumstances where a Retired NFL Football Player manifests actual cognitive impairment.” (Settlement Agreement § 6.6(b).) Ms. Moyes argues that this section supports her appeal because Dr. McKee’s report and Ms. Bush’s affidavit both describe undiagnosed cognitive impairment that Mr. Stabler manifested while alive. (*See* Ex. 1, Claimant’s Objection at 7–8.) Section 6.6(b) goes on to state that “[f]or the avoidance of any doubt, the identification of a condition—for example, through a blood test, genetic test, imaging technique, or otherwise—that has not yet resulted in actual cognitive impairment . . . experienced by the Retired NFL Football Player does not qualify as a Qualifying Diagnosis.” (Settlement Agreement § 6.6(b).) In other words, this provision merely confirms that a valid diagnosis requires not only that the player be living at the time—as set forth in the Injury Definition—but also that impairment must actually manifest at the time of the diagnosis. Nothing in Section 6.6(b) supports that a backwards looking, *post-mortem* analysis based on interviews with family members is sufficient to meet the Injury Definition for Alzheimer’s. Nor would such an interpretation be proper because it would read a clear term out of the Settlement Agreement without any proper basis.

Finally, Settlement Program FAQ 116 provides, in part, that “[t]he Claims Administrator has discretion to review and decide Settlement Class Members’ requests to excuse the Diagnosing Physician Certification Form and/or medical records reflecting Qualifying Diagnosis requirements and to determine the appropriate date of diagnosis in such circumstances, based on evidence the Claims Administrator deems necessary to evaluate each request.” (Settlement Program FAQ 116; *see* Ex. 1, Claimant’s Objection at 8–9.) The Claims Administrator did not purport to exercise any such discretion here. Nor could the Claims Administrator have done so, as FAQ 116 does not

eviscerate the requirement that the retired player receive the diagnosis while living. Instead, the FAQ was intended to apply in circumstances where a retired player received a diagnosis while he was living, but where documentation establishing that diagnosis may be lacking.³ Here, Mr. Stabler never received such a diagnosis, and FAQ 116 is therefore inapplicable.

B. The Special Master Properly Upheld the Denial of Ms. Moyes' Alzheimer's Claim After Considering Her Appeal

Next, Ms. Moyes contends that the Special Master erred as a matter of law because he allegedly considered only the Death with CTE claim instead of the Alzheimer's claim that relied on different evidence. (Ex. 1, Claimant's Objection at 5–6, 9–10.) This argument is belied by the claim and appeal history.

Ms. Moyes initially submitted a Diagnosing Physician Certification Form that claimed a diagnosis of Death with CTE, and not Alzheimer's Disease. (*See* Ex. 3, Diagnosing Physician Certification Form at 5.) The Claims Administrator correctly denied that claim, but the Denial Notice also stated that: "If [Mr. Stabler] received a different Qualifying Diagnosis *while he was living* (i.e., . . . *Alzheimer's Disease* . . .), [Ms. Moyes] may submit a Claim Package for that Qualifying Diagnosis for review by the Claims Administrator. The new Claim Package must contain . . . a new Diagnosing Physician Certification Form, and medical records that reflect the newly asserted Qualifying Diagnosis." (Ex. 6, Denial Notice at 1 (emphases added).) Although Ms. Moyes filed a Claim Form for Alzheimer's, she did not include a new Diagnosing Physician Certification Form or any medical records reflecting a diagnosis of Alzheimer's while Mr. Stabler was living; no such records exist.

³ To the extent that the FAQ purports to expand the circumstances in which the Claims Administrator may excuse the lack of medical records or a Diagnosing Physician Certification Form beyond those set forth in the Settlement Agreement, the NFL Parties respectfully submit that it would constitute a material change to the terms of the Settlement Agreement and, thus, would be improper.

Nonetheless, Ms. Moyes appealed the denial of the Alzheimer's claim and now argues, without any factual basis, that the Special Master "did not consider the Stabler Estate's Alzheimer's claim." (Ex. 1, Claimant's Objection at 6, 9.) Ms. Moyes' appeal and the NFL Parties' opposition both focused exclusively on the denial of her Alzheimer's claim because her appeal stated that she "does not seek a Monetary Award for a Qualifying Diagnosis of CTE." (Ex. 5, Appeal at 1 n.1; Ex. 7, Opposition.) Although the Special Master's Post Appeal Notice of Denial continued to list the original claim denial for Death with CTE, that provides no basis to believe that the Special Master failed to review or consider the parties' submissions on appeal before affirming the denial of Ms. Moyes' claim. (*See* Ex. 8, Post Appeal Notice of Denial.) There is simply no support whatsoever for Ms. Moyes' claim that the Special Master did not adequately consider the arguments she made on appeal. Indeed, as demonstrated above, because Mr. Stabler did not receive an Alzheimer's diagnosis while living, the plain terms of the Settlement Agreement required denial of the claim.

Conclusion

For the foregoing reasons, the NFL Parties respectfully request that the Court deny Claimant's Objection to the Special Master's determination.

Dated: February 11, 2019

Respectfully submitted,

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